

2000

Steven Earl Bowen v. Patricia Bowen : Brief of Appellee

Utah Supreme Court

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Recommended Citation

Brief of Appellee, *Bowen v. Bowen*, No. 20000472.00 (Utah Supreme Court, 2000).

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**IN THE COURT OF APPEALS
OF THE STATE OF UTAH**

STEVEN EARL BOWEN,

Petitioner/Appellee,

vs.

PATRICIA BOWEN,

Respondent/Appellant.

Appellate No. 20000472-CA

Argument Priority No. 15

District Court 984500349 DA

BRIEF OF APPELLEE

Appeal from the Judgment and Orders of the District Court
of the Fifth Judicial District, State of Utah
the Honorable James L. Shumate, Presiding.

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FILED

JAN 23 2001

COURT OF APPEALS

Duplicate

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JURISDICTION OF THE UTAH COURT OF APPEALS

Jurisdiction is proper in the Utah Court of Appeals pursuant to Utah Code §78-2a-3(2)(h) (2000).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1

Is the lower court's distribution of property and allocation of debts equitable? Do the court's findings support such an award?

STANDARD OF REVIEW

"In a divorce proceeding, there is no fixed formula from which to determine the division of property. Thus, we afford the trial court considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity. The trial court's findings of fact are presumed to be correct, and because we lack the advantage of seeing and hearing witnesses testify, we do not make our own findings of fact. Accordingly, we view the evidence and all the inferences that can reasonably be drawn therefrom in a light most supportive of the trial court's findings." Baker v. Baker, 866 P.2d 540, 542-543 (Utah App. 1993). "Determining and assigning values to marital property is a matter for the trial court, and this Court will not disturb those determinations absent a showing of clear abuse of discretion.' In making such orders, the trial court is permitted broad latitude, and its judgment is not to be lightly disturbed, so long as it exercises its discretion in accordance with the standards set by this court."

Rappleye v. Rappleye, 855 P.2d 260, 263 (Utah App. 1993) (citations omitted).

PRESERVATION OF THE ISSUE

This issue was preserved in oral argument and in post trial motions. (R. 507-27; R. 189, p. 16-24).

ISSUE NO. 2

Was it proper for the trial court to amend the Findings of Fact and Conclusions of Law in the instant matter beyond the request in Petitioner's "Motion to Amend Findings of Fact and Conclusions of Law," filed on May 6, 1999, and are said findings supported by the evidence and consistent with prior findings?

STANDARD OF REVIEW

Rule 52(a) of the Utah Rules of Civil Procedure is the determinative rule on the issue of amending findings of fact. A judge abuses his discretion if the findings are "against the clear weight of the evidence." Estate of Bartell, 776 P.2d 885 (Utah 1989).

PRESERVATION OF THE ISSUE

This issue was preserved in post trial motions. (R. 507-27; R. 554, p.5-10).

ISSUE NO. 3

Did the lower court accurately set forth the separate property? Were there any extraordinary circumstances justifying the inclusion of premarital separate property as part of the marital estate?

STANDARD OF REVIEW

“In a divorce proceeding, there is no fixed formula from which to determine the division of property. Thus, we afford the trial court considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity. The trial court’s findings of fact are presumed to be correct, and because we lack the advantage of seeing and hearing witnesses testify, we do not make our own findings of fact. Accordingly, we view the evidence and all the inferences that can reasonably be drawn therefrom in a light most supportive of the trial court’s findings.” Baker v. Baker, 866 P.2d 540, 542-543 (Utah App. 1993).

PRESERVATION OF THE ISSUE

This issue was preserved in oral argument and in post trial motions. (R. 507-27; R. 554, p. 5-10; R. 189, p. 16-24).

ISSUE NO. 4

Did the lower court fail to properly amend its findings pursuant to the Respondent’s request in her “Motion to Amend Findings of Fact and Conclusions of Law,” entered on or about December 1, 1999? As left unamended, are the lower court’s findings supported by the evidence and consistent with the court’s prior findings?

STANDARD OF REVIEW

Rule 52(a) of the Utah Rules of Civil Procedure is the determinative rule on the issue of amending findings of fact. A judge abuses his discretion if the findings are

“against the clear weight of the evidence.” Estate of Bartell, 776 P.2d 885 (Utah 1989).

PRESERVATION OF THE ISSUE

This issue was preserved at trial and in post trial motions. (R. 507-27; R. 554, p. 5-10; R. 189, p. 16-24).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Utah Code Ann. §30-3-5 (2000); See Addendum @ A. 1.

Utah Rule of Civil Procedure, 52; See Addendum @ A. 3.

STATEMENT OF THE CASE

1. NATURE OF THE CASE

Mr. Bowen, Appellee, and Mrs. Bowen, Appellant, have been married and divorced four separate times, to wit:

- a. Married September 22, 1989 - divorced February 25, 1993;
- b. Married April 26, 1993 - divorced July 1, 1994;
- c. Married November 24, 1994 - divorced May 19, 1995; and
- d. Married August 4, 1995 - divorced March 4, 1999.

The parties fourth marriage and divorce is the subject of this appeal. Ever since the parties' first marriage, the parties made a financial plan to use Mr. Bowen's construction knowledge and skills to increase the equity in their home or homes until they owned their own home free and clear. The parties continued to adhere to this plan throughout their

four Marriages.

When their last marriage ended, Mr. Bowen had contributed, enhanced, improved, and commingled assets with Mrs. Bowen's separate property (Diamond Valley Home) as well as the marital estate. Mr. Bowen used his construction knowledge and skills to further their joint venture. Mrs. Bowen refinanced her premarital home twice and with portions of the cash proceeds, bought a lot in Diamond Valley and a lot in Winchester Hills. She quit claimed the lots over to herself and Mr. Bowen as joint tenants with full rights of survivorship to obtain needed financing and further the joint venture.

Mr. Bowen improved the two lots as well as the Diamond Valley Home. Pursuant to Court Order, Mr. Bowen, on four separate occasions tried to retrieve his personal belongings and work tools from Mrs. Bowen's residence. Only a portion of the property was returned, items were returned damaged, and Mr. Bowen was not allowed to inspect the home. For violation of court orders, Mrs. Bowen has held in contempt.

After the court made its findings and amended them twice, Mr. Bowen was awarded a discrepancy in the marital estate in his favor in the amount of \$48,700.00 for the improvements, contributions, enhancements, and commingling which had occurred. Mr. Bowen produced evidence indicating improvements, contributions, and enhancements, in the amount of \$67,929.38.

2. COURSE OF THE PROCEEDINGS

Mr. Bowen filed the divorce Complaint on May 20, 1998. (R. 002). On May 28,

1998, the court heard Mrs. Bowen's Motion for a Temporary Restraining Order. (R.026). On June 3, 1998, Mr. Bowen brought an Order to Show Cause to enforce his right to retrieve his personal property as was provided in the Temporary Restraining Order. (R. 035, pp. 1-27). Mrs. Bowen answered the Complaint on June 16, 1998. (R. 044). On August 14, 1998 Mr. Bowen brought another Order to Show Cause because Mrs. Bowen still would not return his personal property. (R. 134, pp. 1-24). On September 17, 1998, Mr. Bowen again brought an Order to Show Cause because Mrs. Bowen continued to refuse to return his personal property. (R. 166, pp. 1-12). On November 25, 1998, Mr Bowen brought another Order to Show Cause for the same reasons mentioned above, and Mrs. Bowen was found to be in contempt and was placed in jail. (R. 178, pp. 1-44). Trial was conducted on December 17, 1998 for a bifurcation (R. 187; 189, pp. 1-14) and on February 4, 1999 for all other issues including the issue of property division. (R. 192; 377, pp. 1-49).¹ The bifurcated decree of divorce was entered on March 4, 1999. (R. 378).

The court's "Findings of Facts and Conclusions of Law" were entered on April 19, 1999. (R. 395). On May 6, 1999, Mr. Bowen filed his "Motion to Amend Findings of Fact and Conclusions of Law" (R. 433) and "Memorandum of Points and Authorities in Support of Motion to Amend Findings of Fact and Conclusions of Law." (R. 435). On

¹ Please note that Appellant's Brief references the bifurcation transcript at R. 189 when it should reference the trial transcript of the property division issue R. 377.

May 19, 1999, Mrs. Bowen filed her "Motion for New Trial and Supporting Memoranda." (R. 450). By "Ruling" dated October 15, 1999, Mr. Bowen's Motion was granted in part and denied in part and Mrs. Bowen's Motion for New Trial was denied. (R. 487). The court also entered an "Amendment to Findings of Fact and Conclusions of Law" on October 15, 1999 (R. 483) and on November 16, 1999, a "Supplemental Decree of Divorce." (R. 498).

Mrs. Bowen then filed her "Motion to Amend Findings of Fact and Conclusions of Law." (R. 505). The Court entered an "Order" on May 1, 2000, which granted Mrs. Bowen's Motion in part and denied in part. (R. 560). The Notice of Appeal was filed on May 31, 2000. (R. 565).

3. DISPOSITION IN THE COURT BELOW

The trial court ordered that the findings and conclusions entered April 19, 1999, be modified by the amended findings and conclusions entered on October 15, 1999, the supplemental decree entered on November 16, 1999, and again by the order entered on May 1, 2000.

4. STATEMENT OF FACTS

Mr. and Mrs Bowen had been previously married to each other three previous times prior to the divorce which is the subject of this proceeding. The parties were divorced for their third time on May 19, 1995. (R. 395-397). During their third marriage, Mr. Bowen made approximately \$9,700 in improvements to the Diamond Valley Home.

(R. 204) However, the trial court held that these improvements were res judicata with respect to the May 19, 1995 divorce. (R. 397).

On August 4, 1995, Mr. and Mrs. Bowen decided to remarry for the fourth time. They lived in Mrs. Bowen's premarital home in Diamond Valley, Utah. Prior to their fourth marriage, Mr. Bowen owned a construction company, Interwest Home Works. (R. 2-8). Mr. Bowen and Mrs. Bowen made a joint venture to use his construction skills and his company and her equity to build two more homes in an effort to build enough equity to own their own marital home free and clear. (R.377, p. 11, 11. 11-25 - p. 12, 11. 1-6).

In furthering their joint venture, Mr. Bowen used tools and materials owned by his company as well as personally purchased materials and improved the Diamond Valley Home.(R. 253; 377. p, 8, 11. 16-25). These improvements increased the equity in Mrs. Bowen's Diamond Valley Home. (R. 254; and 405). Several months after Mr. Bowen started improvements on the home, Mrs. Bowen refinanced the Diamond Valley Home in November, 1995 and received \$44,660.34 in cash proceeds, of which \$12, 782.15 went as a down payment to purchase Winchester Hills Lot 127, and \$9,641.00 went as a down payment to purchase Diamond Valley Lot 19. (R. 291).

On December 10, 1997, Mrs. Bowen obtained a second refinance on the Diamond Valley Home and received \$55,296.51 in cash proceeds. (R. 291). The cash proceeds paid off both of the lots. On April 17, 1998, Mrs. Bowen quit claimed title to both the

Diamond Valley Lot 19 and the Winchester Hills Lot 127 to herself and Mr. Bowen as Joint Tenants with full rights of survivorship in order to obtain a construction loan. (R. 252).

On April 20, 1998, Mr. Bowen invoiced \$6,023.78 in improvements to the Diamond Valley Lot 19 of which \$1,850 were expenses he personally paid for. (R.253; R. 259). Mr. Bowen also personally paid \$3,034.13 in expenses for the Winchester Hills Lot. (R. 260).

From August, 1995 through May, 1998, Mr. Bowen made \$17,567 in improvements to the Diamond Valley Home. (R. 254; 377, p. 8, 11. 16-25). In addition to the \$17,567 in improvements made to the Diamond Valley Home, Mr. Bowen personally expended \$18,806.53 in maintenance, taxes, mortgage payments, and advertisements towards the Diamond Valley Home. (R. 257-58; 377, pp. 9-10). Mr. Bowen personally paid for household expenses and maintenance of Mrs. Bowen's premarital personal property in the amount of \$22,497.94. (R. 261-65).

At trial, Mrs. Bowen claimed that she and her son-in-law Ken Thornock, assisted in constructing the improvements allegedly constructed solely by the Petitioner. (R.377, p. 20, 11. 10-13; R. 377, p.33, 11. 6-13). Mr. Bowen testified at trial, through stipulated proffer, that he and only he worked on the construction improvements claimed by Mr. Bowen. (R. 377, p. 8, 11. 16-19).

Mrs. Bowen claims that she either paid for the materials used or that the parties

salvaged the materials from other construction jobs, or in the case of rock and gravel, retrieved the material from the hills. (R. 377, p.20 11. 13-24, p.18, 11. 10-12). Mr. Bowen presented evidence of improvements that he personally paid for without the contribution of Mrs. Bowen. (R. 253, 254, 257-260; 377, pp. 8-10).

Prior to their fourth marriage the parties had the following property:

a. Mr. Bowen: At the time of their fourth marriage, Mr. Bowen had a 1993 Ford Pickup, his construction tools, his personal property, and an IRS tax obligation in the amount of \$43,329.58 as of November 16, 1998. (R. 377).

b. Mrs. Bowen: At the time of their fourth marriage, Mrs. Bowen had a home in Diamond Valley, a Corvette, a 1991 Chrysler, her personal property, and furnishings. (R. 377; and R. 483).

During their fourth marriage the parties purchased the following property: 1) a saddle, television, a wood burning stove, 1989 Ford Dually Pickup, Diamond Valley Lot 19, Winchester Hills Lot 127, \$6,967.75 in tools, a 1985 Ford Pickup, and a 1994 Mercury Topaz. (R. 377; 255; 291; 293-318).

The parties separated in May, 1998 and Mr. Bowen filed for divorce. (R.002). Mr. Bowen attempted several times to retrieve his personal property including work tools, but to no avail. (R. 026 pp. 20-21). The May 28, 1998 Temporary Orders ordered Mrs. Bowen not to sell, give away, or hypothecate any of the marital property that she had. (R. 026, pp. 18, 11. 12-17). Also, Mr Bowen was instructed by the Court to go over to Mrs.

Bowen's house, escorted by law enforcement, and retrieve his personal belongings. (R. 026, pp. 20-21). When Mr. Bowen went to retrieve these items, he found that Mrs. Bowen had sold many of the items. (R. 026, pp.20-21). The Judge told Mrs. Bowen not to sell anymore of Mr. Bowen's personal property and work tools, and that if she did, she would be held in contempt. (R. 026, p. 22).

Mr. Bowen was still unable to retrieve his personal belongings and brought an Order To Show Cause on June 3, 1998. During the proceeding, Mrs. Bowen testified that she sold Mr. Bowen's \$2,000 cement mixer for \$15. (R. 035, p. 26, 11. 6-22). Judge Shumate ordered Mrs. Bowen to retrieve all of the property that she could and also stated that what she did looks like a fraudulent transfer. (R. 035, p.26, 11. 6-22).

At the August 14, 1998 Order To Show Cause, Mrs. Bowen still had not allowed Mr. Bowen to retrieve all of his personal belongings and work tools. (R. 134, pp. 7-8). Mrs. Bowen had answered interrogatories stating that the items were not sold, but were in the possession of other people. (R. 134, pp. 11-12). Mr. Bowen's business had been damaged as a result of not having access to his tools of trade. (R. 134, p.12). The Court ordered Mrs. Bowen again to retrieve Mr. Bowen's personal property and turn over the 1989 Ford Dually so Mr. Bowen could work to support both parties. (R. 134, pp. 21-22).

For the third time, Mr. Bowen tried to recover his property, but was not able to. (R. 166, p. 9). This time when Mr. Bowen went out to Mrs. Bowen's residence escorted by a sheriff, he found some of his belongings outside on the driveway, but was not allowed to

enter the house to search for his remaining items as was ordered. (R. 166, p.7) Mr. Bowen did recover the 1989 Ford Dually Pickup, but it had five cigarette burns in the driver's seat. (R. 166, p.8).

On November 25, 1998, Mr. Bowen brought another Order To Show Cause against Mrs. Bowen for not allowing him to retrieve his work tools and personal belongings, for refusal to admit Mr. Bowen into her home, and for waste. (R. 178, p.3). The court found Mrs. Bowen in contempt for violating the court's previous orders. (R. 178, p.24). It was also pointed out to the court that Mrs. Bowen has not returned any of Mr. Bowen's business papers, which were needed in order for Mr. Bowen to prove his case at trial. (R. 178, p.30). Mrs. Bowen's conduct in refusing to produce his business records, failing to return his personal property and work tools, failing to allow Mr. Bowen entrance to Mrs. Bowen's residence to search for belongings, and returning items damaged, prejudiced Mr. Bowen's case. (R. 178, p. 31). Mr. Bowen still has not received \$5,505.00 in personal property from Mrs. Bowen. (R. 256). When Mr. Bowen was able to retrieve his tile saw, the power cord had been ripped out. (R. 178, p.28).

Mr. Bowen has complied with the court orders. (R. 166, p. 9). He has not created disturbances when he has gone out to Mrs. Bowen's house to retrieve his personal belongings, nor has he gone out to Mrs. Bowen's house without the escort of law enforcement officers. (R. 166, p.9) Mr. Bowen dropped his argument about the 1989 Ford Dually being a gift and allowed that item to be treated with the marital estate. (R.

377, p. 13).

The trial court in its Findings Of Facts And Conclusions Of Law found that there was evidence of contributions and awarded a \$23,410.00 difference in the marital estate in favor of Mr. Bowen. (R. 398). Mrs. Bowen was awarded the Diamond Valley Home as pre-marital property. (R. 398). Since Mr. Bowen contributed at least \$23,410.00 to Mrs. Bowen's pre-marital property, the court found it equitable to adjust for the contribution out of the marital estate. (R. 398). Regarding the \$43,000 tax lien that Mr. Bowen brought into the marriage, the court stated, "it [wa]s not convinced by the requisite evidence that the tax lien will have an impact on the dissolution of th[e] marriage and distribution of the property of the marriage." (R. 399).

The court in its Findings Of Facts And Conclusions Of Law had failed to allocate the \$11,000 Mountain America Construction Loan. The court granted Mr. Bowen's Motion To Amend Findings and allocated the \$11,000 Mountain America Construction Loan. (R. 493). On October 14, 1999, the Amendment to the Findings Of Fact And Conclusions Of Law allocated the \$11,000 Mountain America Construction Loan to Mr. Bowen and articulated what was marital property and pre-marital property. (R. 483-85).

The court awarded Mr. Bowen as pre-marital property the following: 1990 utility trailer, army trailer, First Security Bank checking account, Tools listed in Exhibit A of Bowen Complaint, Antique farm equipment, Wood-burning stove, Saddle, and sculpture. The court awarded Mrs. Bowen as pre-marital property the following: Mountain America

checking account, Mountain America credit card debt, Advanta credit card debt, Chase Manhattan credit card debt, Attorney's fees, Student Loan, Personal Property, Diamond Valley Home, Household furnishings, appliances and equipment.

The court determined the marital estate consisted of: Mountain America Construction Loan (-\$11,000), 1989 Ford Dually Pickup (\$9,500), 1993 Ford Pickup (\$3,500), 1985 Ford Pickup (\$3,500), 1994 Mercury (\$3,000), the Winchester Hills Lot 127 (\$55,000), and the Diamond Valley Lot (\$45,000). The court then determined that the contributions made by Mr. Bowen justified a discrepancy in the division of the marital estate of \$47,500 in favor of Mr. Bowen. (R. 483-85).

On May 1, 2000, the court again entered its Order based on Mrs. Bowen's Motion To Amend Findings Of Facts And Conclusions Of Law. The court Amended its Findings to include the Wood-burning stove in the marital estate and awarded it to Mr. Bowen. (R. 560-62). In adding the Wood-burning stove to the marital estate, the court determined that Mr. Bowen's contributions justified a discrepancy of \$48,700.

SUMMARY OF ARGUMENTS

Issue No. 1

The trial court made an equitable division of property. The trial court's criticism of the quick-court kiosk system was dicta and not the basis for the court's decision. The court considered the following factors in equity and found sufficient evidence of contributions, commingling and enhancement to justify the court's decision.

Mr. Bowen was able to specifically prove that he personally contributed \$18,806.53 in maintenance, taxes, mortgage payments, and advertisements towards Mrs. Bowen's Diamond Valley Home and \$22,497.92 for household expenses and maintenance of Mrs. Bowen's premarital personal property. Mrs. Bowen did not have a steady income and the parties did not have any children together.

Mr. Bowen proved at trial that the parties entered into a joint venture where they combined her equity and his construction knowledge, tools, and materials, to build equity until they could own a marital home free and clear. In furtherance of their joint venture, Mr. Bowen made improvements to Mrs. Bowen's Diamond Valley home so that her equity would increase. They used her increased equity to purchase two lots, on which they would build two more houses. As evidence of her intentions, Mrs. Bowen quit claimed title to the two lots into both of their names as joint tenants to obtain a construction loan. The nature of their joint venture constitutes commingling as the court correctly determined.

Mr. Bowen made significant contributions and improvements to Mrs. Bowen's Diamond Valley home. From August, 1995 through May, 1998, Mr. Bowen made \$17,567 in improvements to the Diamond Valley Home and personally expended \$18,806.53 in maintenance, taxes, mortgage payments, and advertisements towards the Diamond Valley Home. Mr. Bowen personally paid for household expenses and maintenance of Mrs. Bowen's premarital personal property in the amount of \$22,497.94.

Mr. Bowen made \$6,023.78 in improvements to the Diamond Valley Lot and \$3,034 of improvements to the Winchester Hills Lot. Mr. Bowen would have been able to produce more evidence as to improvements made to the Diamond Valley home and the two lots, but Mrs. Bowen failed to produce Mr. Bowen's business records. However, Mr. Bowen has proved that he made improvements of \$67,929.25 of which the trial court awarded Mr. Bowen a discrepancy in the marital estate of \$48,700.00.

Issue No. 2

The court did not err by amending the findings beyond the scope of Mr. Bowen's Motion to Amend. The court may amend the findings upon its own initiative. National Farmers' Union Property & Cas. Co. v. Thompson, 286 P.2d 249 (Utah 1955). The Court, upon Mr. Bowen's Motion To Amend Findings, reallocated three credit card debts to Mrs. Bowen where there was evidence in the record that the charges on the three credit card debts went to improve the marital estate and the parties' joint venture. It is immaterial whether the debts are classified as premarital property or marital property because of the contribution, enhancement, and commingling evidence already addressed. If the court erred in classifying these debts, the error is harmless with respect to the overall equitable distribution made by the court.

Issue No. 3

The Court made an equitable division of property based upon equitable factors of contribution, enhancement and commingling of assets as addressed in Issue No. 1. In

this case if the court incorrectly classified each item as marital or premarital it is harmless error. The court was trying to make an overall equitable division of property and had the opportunity to review its decision twice upon the Motions to Amend Findings filed. Specifically, Respondent argues that the court incorrectly classified the Winchester Hills Lot as part of marital estate because it was purchased with equity from the Diamond Valley Home which the Court awarded to Respondent as her separate property. However, Respondent's contention ignores the evidence regarding Petitioner's contributions to Respondent's separate property, the support that he gave her during the marriage, and the joint venture (commingling) that was apparent in the dealings that the parties had with one another. The Court has the power to award one spouse's separate to the other when equitable circumstances dictate. Thus, even though Respondent believes the Winchester Hills Lot should have been classified as her separate property, the Court was still within its equitable powers to award that property to the Petitioner. Conversely, Petitioner's contention is that the Diamond Valley Lot should have been classified as marital property rather than the Respondent's separate property. However, since that property was awarded to the Respondent this is likewise harmless error.

Issue No. 4

It was proper for the Court to deny Mrs. Bowen's Motion to Amend Findings. It is immaterial whether the property or debts are classified as premarital property or marital property because of the contribution, enhancement, and commingling evidence already

addressed. If the court erred in classifying these debts, the error is harmless with respects to the overall equitable distribution made by the court.

ARGUMENTS

Issue No. 1

THE COURT MADE AN EQUITABLE DISTRIBUTION

“In a divorce proceeding, there is no fixed formula from which to determine the division of property. Thus, we afford the trial court considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity. The trial court’s findings of fact are presumed to be correct, and because we lack the advantage of seeing and hearing witnesses testify, we do not make our own findings of fact. Accordingly, we view the evidence and all the inferences that can reasonably be drawn therefrom in a light most supportive of the trial court’s findings.” Baker v. Baker, 866 P.2d 540, 542-543 (Utah App. 1993).

Utah Code Annotated states that the court may make such orders in relation to the children and property as may be equitable. U.C.A. §30-3-5 (2000). The Utah Court of Appeals defined marital property in Dunn v. Dunn as, “ordinarily all property acquired during marriage and it encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived.” 802 P.2d 1314, 1317-18 (Utah App. 1990). “Generally, ‘[e]ach party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property’. However, neither guideline is

immutable. Thus, the separate property of one spouse may be divided if it ‘has been commingled so that it has lost its separate character, or where it is fair, just and equitable to do [so]’. Likewise, marital property may be allocated unequally where circumstances ‘justify departure from the presumptive rule of equal distribution.’” Thomas v. Thomas, 987 P.2d 603, 610 (Utah App. 1999) (citations omitted).

The court has stated, “[d]etermining and assigning values to marital property is a matter for the trial court, and this Court will not disturb those determinations absent a showing of clear abuse of discretion.’ In making such orders, the trial court is permitted broad latitude, and its judgment is not to be lightly disturbed, so long as it exercises its discretion in accordance with the standards set by this court.” Rappleye v. Rappleye, 855 P.2d 260, 263 (Utah App. 1993) (citations omitted).

A. Factors In Equity or Exceptional Circumstances:

The factors in equity the court generally considers when deciding to make an unequal division of property whether marital or separate property are: “the amount and kind of property to be divided; whether the property was acquired before or during the marriage; the source of the property; the health of the parties; the parties’ standard of living, respective financial conditions, needs, and earning capacity; the duration of the marriage; the children of the marriage; the parties’ ages at the time of marriage and of divorce; what the parties gave up by the marriage; and the necessary relationship the property division has with the amount of alimony and child support to be awarded. Of

particular concern ... is whether one spouse has made any contribution toward the growth of the separate assets of the other spouse and whether the assets were accumulated or enhanced by the joint efforts of the parties.” Walters v. Walters, 812 P.2d 64, 67 (Utah App. 1991) (emphasis added).

The trial court in this proceeding was within its broad discretion and exercised its equitable power within the standards set by this court. Mrs. Bowen argues that the only equitable factor cited by the Court as justifying a departure from the presumptive rule is that the parties obtained their third divorce decree by using the quick-court kiosk. (See Appellant’s Brief at 23-24). Even though the trial court was critical of the manner in which the third divorce was obtained, the court held that it was res judicata and did not allow Mr. Bowen’s evidence of improvements made before the their third divorce. What Judge Shumate said about the quick-court kiosk was dicta and should not be used as a diversion from the factors in equity that the court based its decision on. The factors in equity that the trial court considered are: 1) contributions; 2) commingling; and 3) enhancement, maintenance and protection.

In Mortensen v. Mortensen, the court looked at the equity in awarding two-thirds of the marital property to one spouse and one-third to the other spouse. The factors in equity the court considered are: 1) the parties married at a young age and did not bring anything into the marriage; 2) husband made approximately twice that of the wife; 3) the wife waived alimony; and 4) the wife was not awarded any part of husband’s retirement.

760 P.2d 304 (Utah 1988).

The Mortensen Court stated, “[w]e conclude that in Utah, trial courts making ‘equitable’ property division pursuant to section 30-3-5 should, in accordance with the rule prevailing in most other jurisdictions and with the division made in many of our own cases, generally award property acquired by one spouse by gift and inheritance during the marriage to that spouse, together with any appreciation or enhancement of its value, unless (1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, or (2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse.” Mortensen, at 308.²

B. Contributions: The court in Mortensen looked at the contributions to the marriage as a factor in determining an equitable division of the property. In the present case, Mr. Bowen made substantial contributions to the marriage (R. 257-261). Mr. Bowen brought in the majority of the income and worked to enhance, maintain, and protect Mrs. Bowen’s separate property. Mrs. Bowen failed to produce Mr. Bowen’s business records (R. 178, p. 30. 11. 10-25; R. 377, p. 43, 11. 19-25, p. 44, 11. 1-7). and Mr. Bowen was not able to produce evidence of all of his contributions to the

² Justice Zimmerman in his concurrence in Mortensen v. Mortensen would apply this rule to separate property as well as to gifts and inheritances.

marriage, but was able to specifically prove that he personally contributed \$18,806.53 in maintenance, taxes, mortgage payments, and advertisements towards the Diamond Valley Home; (R. 257-58; 377, pp. 9-10; 178 p. 30), and \$22,497.92 for household expenses and maintenance of Mrs. Bowen's premarital personal property. (R. 261-65). Mrs. Bowen did not have consistent substantial work during their fourth marriage. (R. 377, p. 12, 11. 9-12; R. 553, p.16, 11. 22-25). Although a spouse's financial contribution is not the sole factor the court should consider, it is still a factor that a court in equity may consider.

In Huck v. Huck, the Utah Supreme Court held that "the trial court properly looked to the contributions of the parties during the marriage. Plaintiff's only income was derived from the rental properties he owned and managed. Defendant, though attending school, was employed and paid most of the household expenses, food, medical care, and insurance, as well as child care and her own personal expenses. While Petitioner used his income to acquire additional properties, defendant's funds were consumed in supporting the parties and their child. The trial court was correct in holding that the properties were marital property that could not have been acquired by plaintiff without defendant's contribution toward household expenses." 734 P.2d 417, 420 (Utah 1986). Mrs. Bowen could not have acquired the loan to improve the two lots without the contributions made by Mr. Bowen. Mr. Bowen's contributions and improvements to the Diamond Valley house made it possible for Mrs. Bowen to refinance her home and

acquire the two lots. Mrs. Bowen testified that she was not able to obtain a construction loan to improve the lots without transferring title into both of their names. (R. 377). It is clear that Mr. Bowen's contributions to her separate property made it possible for them to obtain the two lots and to make improvements thereon.

C. Commingling: The court stated in its Findings of Facts and Conclusion of Law, "The Court finds that the Petitioner contributed that much value to the Diamond Valley home, but the award of that home to the Respondent is mandated by the prior Decree of Divorce, so this distribution achieves the equitable objectives of the Court." (R. 398). In the Amendment to the Findings of Fact and Conclusions of Law entered on October 14, 1999, the Court stated, "The Court finds the joint marital assets and liabilities of both parties--established through the commingling of assets, as well as mutual domestic contributions made by both parties freeing one another to pursue economic gain--to be as follows:" (R. 484). The Court did not specifically mention commingling in its original Findings, but did so in the Amendment to the Findings. It is important to note that the Court did make a finding of contribution in the original Findings as well as the Amendment to the Findings.

The evidence of commingling presented to the court consists of the parties' joint venture in using her home equity and his construction knowledge and skills to enhance that equity until both parties could own a marital home free and clear. (R. 377, pp. 11-12). In furthering their joint venture, Mr. Bowen used tools and materials owned by his

company as well as personally purchased other materials and improved the Diamond Valley Home.(R.254; 377 p. 8). These improvements contributed to increasing the equity in Mrs. Bowen's Diamond Valley Home. (R.254; 377, p. 8; 405). Several months after Mr. Bowen started improvements on the home, Mrs. Bowen refinanced the Diamond Valley Home in November, 1995 and received \$44,660.34 in cash proceeds, of which \$12, 782.15 went as a down payment to purchase Winchester Hills Lot 127, and \$9,641.00 went as a down payment to purchase Diamond Valley Lot 19. (R. 291).

On December 10, 1997, Mrs. Bowen did a second refinance on the Diamond Valley Home and was able to receive \$55,296.51 in cash proceeds. (R. 291). The cash proceeds paid off both of the lots. On April 17, 1998, Mrs. Bowen quit claimed title to both the Diamond Valley Lot 19 and the Winchester Hills Lot 127 to herself and Mr. Bowen as Joint Tenants with full rights of survivorship. (R. 252).

In Bradford v. Bradford, the court stated, "Utah law provides that a spouse may transfer his or her interest in separately acquired property into the marital estate. See Utah Code Ann. §30-2-3 (1998). A transfer of otherwise separate property to a joint tenancy with the grantor's spouse is generally presumed to be a gift, and, when coupled with an evident intent to do so, effectively changes the nature of that property to marital property." 993 P.2d 887, 892 (Utah App. 1999). During the parties' marriage, Mrs. Bowen quit claimed her interest in the Diamond Valley Lot and the Winchester Hills Lot to herself and Mr. Bowen as joint tenants with a right of survivorship. This fact coupled

with the evidence of a joint venture, effectually changes the nature of the Diamond Valley Lot and the Winchester Hills Lot into marital property.

In Dunn v. Dunn, the Court of Appeals reversed the trial court's finding that an airplane, two cars, and a condominium were separate property, even though the parties brought those items into the marriage. The airplane lost its separate property identity when it "was sold for \$10,000 and he used \$6,500 from that amount as a down payment on another airplane, significantly, the installment payments on the second plane, totaling \$47,844, came from marital income." 802 P.2d 1314, 1321 (Utah App. 1990). The condominium lost its separate property identity "when they sold it and used part of the cash down payment on their new home and the rest for a promissory note payable to them jointly." Id. The cars lost their separate property identity when they were sold and deposited into joint accounts. The court stated, "premarital property was consumed and its identification lost through commingling and exchanges. The record shows that the sale of each credited piece of property resulted in a deposit into the parties' joint accounts or, in the case of the condominium, a promissory note in the joint names of the parties." Id. Premarital property may lose its separate distinction where the parties have inextricably commingled it into the marital estate, or where one spouse has contributed all or part of the property to the marital estate." Id. Mrs. Bowen commingled the equity in her house with the marital estate when she invested it in their joint enterprise. She also commingled the equity when she transferred title of the two lots into their joint names

with a right of survivorship. The Lots then became part of the marital estate.

D. Enhancement, Maintenance and Protection:

Mr. Bowen made significant contributions and improvements to the Diamond Valley home and lots purchased from the proceeds from the two refinances of the Diamond Valley home. From August, 1995 through May, 1998, Mr. Bowen made \$17,567 in improvements to the Diamond Valley Home. (R. 254; 377 p. 8). In addition to the \$17,567 in improvements made to the Diamond Valley Home, Mr. Bowen personally expended \$18,806.53 in maintenance, taxes, mortgage payments, and advertisements towards the Diamond Valley Home. (R. 257-58; 377, pp. 9-10). Mr. Bowen personally paid for household expenses and maintenance of Mrs. Bowen's premarital personal property in the amount of \$22,497.94. (R. 261-65). Mr. Bowen made \$6,023.78 in improvements to the Diamond Valley Lot and \$3,034 of improvements to the Winchester Hills Lot. (R. 253; R. 259-260). Mr. Bowen would have been able to produce more evidence as to improvements made to the Diamond Valley home and the two lots, but Mrs. Bowen failed to produce Mr. Bowen's business records. (R. 178, p. 30. 11. 10-25; R. 377, p. 43, 11. 19-25, p. 44, 11. 1-7). However, Mr. Bowen has proved that he made improvements of \$67,929.25 of which the trial court awarded Mr. Bowen a discrepancy in the marital estate of \$48,700.00.

At trial, Mrs. Bowen claimed that she and her son-in-law Ken Thornock, assisted in constructing the improvements allegedly constructed solely by the Petitioner. (R.377,

p. 20 11. 10-13; R. 377, P.33 11. 6-13). Mr. Bowen testified at trial, through proffer, that he and only he worked on the construction improvements claimed by Mr. Bowen. (R. 377 p. 8, 11. 16-19).

Mrs. Bowen claims that she either paid for the materials used or that the parties salvaged the materials from other construction jobs, or in the case of rock and gravel, retrieved the material from the hills. (R. 377, p.20, 11. 13-24, p.18, 11. 10-12). Mr. Bowen presented evidence of improvements that he personally paid for without the contribution of Mrs. Bowen. (R. 253, 254, 257-260; 377, pp 8-10). Materials salvaged from other jobs would be the separate property of Mr. Bowen's construction company and would not be considered as part of Mrs. Bowen's contribution to the marital estate.

Mr. Bowen has shown ample evidence which the trial court considered to justify the discrepancy awarded in the marital estate.

E. Tax Consequences: Mrs. Bowen argues that there was an inequitable distribution. The Court has sufficient facts to support its findings of a \$48,700 discrepancy in favor of Mr. Bowen to compensate him for his contributions, enhancements and evidence of commingling.

Mrs. Bowen refers to the \$43,000 tax liability to show further inequity and discrepancy. However, the Court found there was insufficient evidence to base a ruling with respect to the existence of the tax liability and the probability that it would have an effect upon the marital estate. (R. 399). In Howell v. Howell, the court stated, "[t]here is

no abuse of discretion if a court refuses to speculate about hypothetical future tax consequences of a property division made pursuant to a divorce. Due to the fact that the obligation was beyond the statute of limitations, the tax consequences were speculative as to whether they could be avoided or delayed, and as to amount that was actually due. The court heard testimony and evidence regarding possible tax implications, but did not err in refusing to adjust the property distribution because of those theoretical consequences.” 806 P.2d 1209, 1213-14 (Utah App. 1991). As in Howell, the trial court heard speculative evidence regarding the \$43,000 tax lien and determined that it would not affect the marital estate. (R. 377, pp.4, 13). Mrs. Bowen should not be allowed to deceive this court by placing the \$43,000 tax lien into her liabilities with respects to the division of the marital estate when it is the separate property of Mr. Bowen and determined to be speculative at best.

The trial court has not made any abuse of discretion and there is ample evidence to support the court’s findings.

Issue No. 2

IT WAS PROPER FOR THE JUDGE TO AMEND FINDINGS OF FACTS BEYOND SCOPE OF MOTION TO AMEND

Rule 52(b) provides, “Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings **or make additional findings** and may amend the judgment accordingly.” Utah Rules of Civil Procedure Rule 52(b) (2000). The court may amend the findings upon its own initiative. National Farmers’ Union

Property & Cas. Co. v. Thompson, 286 P.2d 249 (Utah 1955). The Court upon Mr. Bowen's Motion To Amend Findings, reallocated three credit card debts to Mrs. Bowen where there was evidence in the record that the charges on the three credit card debts went to improve the marital estate and the parties' joint venture. (R. 553). It is immaterial whether the debts are classified as premarital property or marital property because of the contribution, enhancement, and commingling evidence already addressed. If the court erred in classifying these debts, the error is harmless with respects to the overall equitable distribution made by the court. The value of the three credit card debts totals \$5,150 whereas the court allocated the \$11,000 Mountain America Construction loan to Mr. Bowen. Thus, the court's ruling placed Mr. Bowen in a worse position than he was before. With respect to the wood burning stove, the court allocated the \$1,200 stove to Mr. Bowen perhaps to offset the increased debt obligation to Mr. Bowen resulting from the allocation of the Mountain America Construction loan. The Court's overall objective was an equitable property division. Again, if there was an error, then it would be harmless given the evidence of Mr. Bowen's contributions, improvements, and evidence of commingling.

Issue No. 3

THE COURT MADE THE PROPER DETERMINATIONS OF SEPARATE PROPERTY

"Generally, '[e]ach party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property'. However, neither guideline is

immutable. Thus, the separate property of one spouse may be divided if it 'has been commingled so that it has lost its separate character, or where it is fair, just and equitable to do [so]'. Likewise, marital property may be allocated unequally where circumstances 'justify departure from the presumptive rule of equal distribution.'" Thomas v. Thomas, 987 P.2d 603, 610 (Utah App. 1999) (citations omitted). The Court has made an equitable division of property where it specifically found equitable factors of contributions and commingling of assets as addressed in Issue No. 1.

Specifically, with regard to the Winchester Hills Lot 127, Mr. Bowen produced evidence of the parties' joint venture wherein Mr. Bowen would contribute his construction knowledge, skills, tools, and materials and Mrs. Bowen would contribute her equity, (which Mr. Bowen enhanced and protected through his improvements to the Diamond Valley house), so that they could build additional houses and increase their equity until they owned a marital home free and clear. (R. 377, pp.11-12). Mr. Bowen has demonstrated at trial that he made contributions, improvements, and/or enhancements in the amount of \$67,929.25. Mr. Bowen was prejudiced at trial by Mrs. Bowen's failure to produce Mr. Bowen's business records and was not able to prove additional improvements, contributions, and evidence of commingling. (R. 178, p. 30. 11. 10-25; R. 377, p. 43, 11. 19-25, p. 44, 11. 1-7). The court is justified in awarding this property to Mr. Bowen and classifying it as marital property.

With respect to the Saddle, the evidence at trial indicated that the Saddle was

worth \$2,000. (R. 377, p. 43, 11. 6-10) Mr. Bowen's father made the saddle and sold it to Mr. Bowen for \$1,200 thus making a gift of \$800.00. (R.377, p. 41, 11. 8-15) Because of the commingled nature of the gift the judge appropriately awarded the Saddle to Mr. Bowen and included it in the allocation of the marital estate.

With respect to the 1989 Ford Dually Pickup and the 1993 Ford Pickup, there was ample evidence to demonstrate that there were contributions, improvements, and evidence of commingling which justified the allocation of these vehicles.

With respect to the \$43,000 tax liability that Mrs. Bowen brings up to show further inequity and discrepancy, the Court found that there was insufficient evidence to base a ruling with respect to the existence of the tax liability and the probability that it would have an effect upon the marital estate. (R. 399). In Howell v. Howell, the court stated, "[t]here is no abuse of discretion if a court refuses to speculate about hypothetical future tax consequences of a property division made pursuant to a divorce. Tax consequences in this case were speculative as to whether they could be avoided or delayed, and as to amount. The court heard testimony and evidence regarding possible tax implications, but did not err in refusing to adjust the property distribution because of those theoretical consequences." 806 P.2d 1209, 1213-14 (Utah App. 1991). As in Howell, the trial court heard speculative evidence regarding the \$43,000 tax lien, that it was beyond the statute of limitations and determined that it would not affect the marital estate. (R. 377, pp. 4, 13). Mrs. Bowen should not be allowed to deceive this court by placing the \$43,000 tax

lien into her liabilities with respect to the division of the marital estate when it is the separate property of Mr. Bowen and determined to be speculative at best.

The Court made appropriate findings considering the evidence of contributions, improvements, and commingling that took place during the marriage.

Issue No. 4

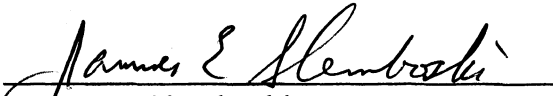
THE COURT'S REFUSAL TO AMEND FINDINGS UPON RESPONDENT'S REQUEST WAS PROPER

The Court has discretion to amend findings or not. (*See* argument Issue No. 2 above.). The Court had already entertained one Motion To Amend Findings of Facts and Conclusions of Law, when Mrs. Bowen requested that certain items of property be classified as separate property rather than marital property. The court made the determinations it did because of the evidence of contributions, improvements, and commingling previously addressed. The court is satisfied that it made an equitable division and feels that it did not commit error. Had the court felt there was error, it would have amended the findings appropriately. However, there is sufficient evidence of contributions, improvements, and commingling to justify the court's actions.

CONCLUSION

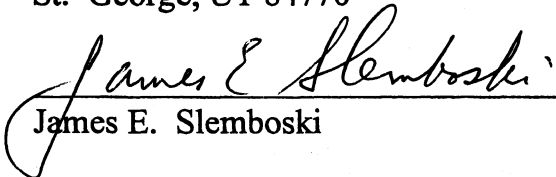
For the foregoing reasons, Mr. Bowen requests that Mrs. Bowen's appeal be denied.

DATED this 23 day of January, 2001


James E. Slemboski
Attorney for the Appellee

I, James E. Slemboski, certify that on the 23 day of January, 2001, served two copies of the attached Brief of Appellee upon Michael D. Hughes, the counsel for the Appellant in this matter, by hand delivering the same to him at the following address:

Michael D. Hughes
HUGHES & BURSELL
187 North 100 West
St. George, UT 84770


James E. Slemboski

ADDENDUM

Utah Code Ann. § 30-3-5 (1993)

- (1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:
 - (a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;
 - (b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;
 - (c) pursuant to Section 15-4-6.5:
 - (i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;
 - (ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and
 - (iii) provisions for the enforcement of these orders;
 - (d) provisions for income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5; and
 - (e) with regard to child support orders issued or modified on or after January 1, 1994, that are subject to income withholding, an order assessing against the obligor an additional \$7 per month check processing fee to be included in the amount withheld and paid to the Office of Recovery Services within the Department of Human Services for the purposes of income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5.
- (2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.
- (3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and

dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) (a) In determining visitation rights for parents, grandparents, and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a visitation schedule a provision, among other things, authorizing any peace officer to enforce a court ordered visitation schedule entered under this chapter.

(5) If a petition for modification of child custody or visitation provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(6) If a petition alleges substantial noncompliance with a visitation order by a parent, a grandparent, or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation.

(7) (a) The court shall consider at least the following factors in determining alimony:

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support; and
- (iv) the length of the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

Utah R. Civ. P. 52

- (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of this action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41 (b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.
- (b) Amendment. Upon motion of a party made not later than 10 days after entry of judgement the court may amend its findings or made additional findings and may amend the judgement accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgement, or a motion for a new trial.
- (c) Waiver of findings of fact and conclusions of law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:
- (1) by default or by failing to appear at the trial;
 - (2) by consent in writing, filed in the cause;
 - (3) by oral consent in open court, entered in the minutes.

- (d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.
- (e) Then a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.
- (f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.
- (g) (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.
- (ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.
- (iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this subsection.
- (A) The court may consider the subsequent spouse's financial ability to share living expenses.
- (B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.
- (h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.
- (8) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.
- (9) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.